

NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION I

CACR06-1189

LONNIE CLEMONS

JUNE 6, 2007

	APPELLANT	APPEAL FROM THE UNION COUNTY CIRCUIT COURT [CR-05-341]
v.		
STATE OF ARKANSAS	APPELLEE	HONORABLE CAROL CRAFTON ANTHONY, JUDGE

AFFIRMED

Appellant, Lonnie Clemons, was charged with three counts of delivery of a controlled substance. A Union County jury convicted him of Counts I and III and sentenced him to twenty years' imprisonment and a fine of \$10,000 on each count. Appellant concedes his guilt on Count III and challenges the sufficiency of the evidence only as to Count I. We affirm.

On March 17, 2005, officers of the El Dorado Police Department set up a drug transaction between a confidential informant, Charles Robinson, and William Parker, Jr. ("Thugger man"), who was known to sell drugs out of his home on Walnut Street. From the police department, Robinson called Parker and arranged to go to Parker's home to purchase crack cocaine. Before he left to go to Parker's home, Robinson was given \$50 in cash, with which he was to purchase half a gram of crack cocaine. Furthermore, it was standard procedure to conduct a search of Robinson's person and vehicle before he left; that search revealed no other money or contraband. He was also wired with a covert camera and audio equipment to allow the officers to listen as the event occurred. Once

the measures were in place, Robinson left for Walnut Street to purchase the crack cocaine.

Officer Conley testified that the audio equipment allowed him to listen as Robinson purchased the crack cocaine. He heard Robinson interacting with another individual, and he heard someone say, "Thugger wasn't there." Robinson responded by saying, "Just need something small." Once the crack cocaine was purchased, Robinson met Officer Conley on the south side of town in their usual meeting place. Officer Conley retrieved the video from Robinson, and when he watched the video, he recognized appellant, and not his twin brother, as the person who sold Robinson the crack cocaine on March 17, 2005. Lab results proved that the substance was indeed crack cocaine.

A similar drug transaction was set up between Robinson and Parker the next day on March 18, 2005. Officer Conley testified that he listened to the second transaction take place, and after it was complete, Robinson met Officer Conley and gave him the video of the transaction and the crack cocaine. A couple of weeks later, on March 30, 2005, a third drug transaction was set up between Robinson and Parker. The third drug transaction was monitored by the police, and Robinson returned to the officers with the crack cocaine.

Officer Conley testified that once the informant returned with the drug purchase, the video tape was downloaded onto a disk. At that time, the disk was reviewed to determine if the purchase occurred as the informant said that it did. Each video was played for the jury. Officer Conley testified that he identified appellant in the video of the March 17 purchase. He also identified appellant in the video of the March 30 transaction. Specifically, he testified that he could see on the video that appellant had a tattoo of his name ("Lonnie") that ran down the back of his arm. There were also still photos from the three different drug transactions. Officer Conley testified that he was positive that it was appellant, and not his twin brother, in each of the photos from the three separate

drug transactions.

Robinson testified that he and appellant went to school together at El Dorado High School. He acknowledged that appellant had an identical twin brother, but stated that it was appellant, and not his twin brother, who sold him crack cocaine on March 17, 18 and 30. He identified appellant in court as the person who sold him the crack cocaine on all three occasions. While Robinson acknowledged that it was sometimes difficult to determine whether it was appellant or his twin brother, the DVD of the first drug transaction, shown during Robinson's testimony, revealed the bottom of a large tattoo on the seller's right arm (only the bottom portion of the tattoo appeared because the seller was wearing a white t-shirt that covered a significant portion of the tattoo). When asked to compare the DVD video of the drug transaction with photos of appellant's right arm (State's Exhibits two and three, taken at defense counsel's office the day before trial), Robinson testified that the tattoo shown in the video was identical to the one shown in State's Exhibits two and three.

It is well settled that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002). In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001). This court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). A fact-finder may accept or reject any part of a witness's testimony, and its conclusion on credibility is binding on this court. *E.g., White v. State*,

47 Ark. App. 127, 886 S.W.2d 867 (1994).

Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Howard, supra*. Such a determination is a question of fact for the fact-finder to determine. *Id.* Additionally, the longstanding rule in the use of circumstantial evidence is that the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused to be substantial, and whether it does is a question for the jury. *Id.* (citing *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000)). Arkansas Code Annotated section 5-64-401(a) (Repl. 2005) provides that it is unlawful to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance.

Appellant challenges the sufficiency of the evidence only as to Count I of the three counts of delivery of a controlled substance. Appellant specifically argues that "it was equally plausible that Donnie (appellant's twin brother) did the March 17 drug deal, and the State failed to present evidence 'with reasonable certainty, [sufficient to] compel a conclusion one way or the other, without resorting to speculation or conjecture'." We disagree that the jury was required to resort to speculation or conjecture in this case. First, the audio equipment allowed Officer Conley to listen as the first drug transaction took place on March 17, 2005. Furthermore, after watching the video, he testified that it was appellant who sold Robinson the crack cocaine on March 17, 2005. Second, informant Robinson testified at trial that appellant was the person who sold him the crack cocaine on March 17, 2005. A DVD of the March 17, 2005 drug transaction, played during Robinson's testimony, depicted the bottom portion of a tattoo on the right arm of the seller. When compared to photographs taken in appellant's attorney's office of appellant's right arm (State's Exhibits two and three), it is clear that the tattoo shown in the DVD is identical to the tattoo on appellant's right arm. Moreover, pictures from the March 18, 2005 drug transaction (of which appellant was

acquitted) clearly show the tattoos on the seller's right arm. When the right-arm tattoo in those pictures is compared to the one shown in State's Exhibits two and three of appellant's right arm, it is clear that they are not the same. Based on the foregoing, we find that there is substantial evidence to support appellant's conviction of Count I of delivery of a controlled substance.

Affirmed.

BIRD and VAUGHT, JJ., agree.